No. 04-277 & 04-281

IN THE

Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *et al.*,
Petitioners,

-and-

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,
Respondents.

On a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE SUPPORTING RESPONDENTS AND AFFIRMANCE OF THE DECISION BELOW

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INTEREST OF AMICUS CURIAE[1]

The National Association of Regulatory Utility Commissioners ("NARUC") is a quasi-governmental nonprofit organization founded in 1889. NARUC represents the government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with the duty of regulating, *inter alia*, telecommunications common carriers. These State officials retain the obligation to assure that such telecommunications services and facilities as may be required by the public convenience and necessity are provided at just and reasonable rates. NARUC's responsibilities are nationwide and involve a unique and broad spectrum of responsibilities. The U.S. Congress and federal courts have recognized NARUC as a proper representative of the collective interests of State utility commissions. NARUC is "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate operation of carriers and utilities.[2]

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[1] Pursuant to U.S. Sup. Ct. Rule 37.6, 28 U.S.C.A., NARUC affirms: (1) signatories authored this brief with assistance from member States, (2) no counsel for a party to the decision below, or other entity, authored this brief in whole or in part, (3) no person or entity other than NARUC contributed financially to its preparation or submission. Pursuant to U.S. Sup. Ct. Rule 37.2(a), 28 U.S.C.A., as explained by the Clerk's office, counsel of record for "respondents" and "petitioners" listed on the Court's website have consented to this filing. H. Symons for NCTA, *et al.*, M. Kellogg for BellSouth, SBC, and Verizon, *et al.*, and J. Butler for EarthLink, BrandX, California, Consumer's Union, CFA, MCI, Vermont, and the Center for Digital Democracy, directly filed letters granting permission in this docket. Copies of these filings and a separate consent letter from the U.S. Solicitor General were filed separately.

[2] See, 47 U.S.C. § 410 (1986); (Congress specified that NARUC, "the national organization of State commissions" responsible for the economic and safety regulation of utilities, nominates members to Federal-State Boards which consider universal service, separations, and related concerns and provide formal recommendations the FCC must act upon.); Cf. 47 U.S.C. § 254 (1996) (describing functions of the Federal-State Board on Universal Service). Cf. *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains "...carriers, to get the

The Federal Communications Commission's ("FCC") classification of cable modem service as solely an information service cannot be squared with the provisions of the Telecommunications Act of 1996.[3] The *Declaratory Ruling*, along with the companion rulemakings,[4] proposes, through the use of Title I, a new, undefined, and potentially unlimited paradigm shift in federal authority to regulate hybrid services just as information services. On its face, that proposal is inconsistent with the FCC's own precedent[5] and the statutory text.

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cards, applied to... (NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the "bingo card" system.) See also, *USA v. Southern Motor Carrier Rate Conference, et al.*, 467 F.Supp. 471 (N.D. Ga. 1979), aff'd, 672 F.2d 469 (5th Cir. 1982); aff'd en banc, 702 F.2d 532 (5th Cir. 1983), rev'd, 471 U.S. 48 (1985). See also *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976).

[3] *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, 47 U.S.C. § 151 et seq., Pub.L. No. 101-104, 110 Stat. 56 (1996) (West Supp. 1998) ("1996 Act" or "Act").

[4] See, Declaratory Ruling and Notice of Proposed Rulemaking, *In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (Mar. 15 2002). ("*Declaratory Ruling*"), Pet. App. 40a - 181a. "Pet. App." refers to the corrected appendix to the petition for a writ of certiorari in No. 04-281. See also, *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers*; CC Docket No. 02-33; *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Dockets Nos. 95-20, 98-10, Notice of Proposed Rulemaking, (rel. Feb. 15, 2002) ("*Wireline NPRM*").

[5] See, e.g., *GTE Operating Companies Tariff No. 1*, 13 F.C.C.R. 22466 (1998) at ¶16. ("We agree that GTE's DSL . . service offering is . . properly tariffed at the federal level.") See also, *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 F.C.C.R. 24,012, 24,030, 1998 WL 458500 (1998), referenced Pet. App. 32a.

Without question, if endorsed by this Court, the undefined scope of the proposed classification scheme will generate significant uncertainty over both the FCC's authority to impose any Title II obligations on this newly "discovered" hybrid *Title I service*, as well as State authority over the underlying facilities and any voice services offered as part of an integrated package of "information services."

Aside from the possible impact on State and Federal universal service programs and oversight of rights-of-way mentioned in the FCC's March 2002 *Declaratory Ruling* and proposed rulemaking[6] for customers who communicate (both voice and data) only through an integrated DSL service, the FCC's decision in this proceeding could eliminate many protections now in place under common carriage principles and Title II of the Communications Act.[7]

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[6] See *Declaratory Ruling* seeking comment on the "extent to which . . States may regulate," at ¶8 (Pet. App. 48a)"); (the "relationship between our classification decision and statutory or regulatory provisions concerning . . . universal service," at ¶72 (Pet. App. 134a), the impact on State rights-of-way authority, at ¶96 (Pet. App. 153a), and the impact on State consumer protection rules, at ¶108 (Pet. App. 164a).

[7] In ¶72 of the *Declaratory Ruling*, Pet. App. 234a, the FCC, referencing the companion *Wireline NPRM*, states: "We note that in both proceedings, we are requesting comment on the extent to which we should exercise Title I authority to regulate the facilities-based provision of interstate information services. We seek comment regarding how our findings . . . in one proceeding should impact the other." The *Wireline NPRM* at ¶¶61-63 seeks comment on the potential impact of the new classification scheme on consumer protection requirements that apply to common carriers (i.e., providers of "telecommunications services"), including, e.g., 47 U.S.C. §258 protections against "slamming", 47 U.S.C. §214's limitations on a telecommunications carrier's ability to unilaterally discontinue service, 47 C.F.R. §§64.2001-2009 rules restricting carrier use and disclosure of customer data derived from the provision of a "telecommunications service," 47 U.S.C. §255 rules for a provider of "telecommunications service" to ensure the disabled access, 47 U.S.C. §201 obligations applicable to the furnishing of service and charges for "communication service," and §202 restrictions preventing "common carriers" from "unreasonably discriminat[ing] with regard to

This novel classification carries serious ramifications for State universal service, emergency communications, and consumer protection policies. It also implicates, and potentially undermines, both State specific programs and the Congressional charge to States (and the FCC) in the 1996 Act to promote advanced telecommunications services like the service at issue here. See, Pub. L. No. 104-104, 110 Stat. 56, § 706 (1996) (47 U.S.C. § 157 note). Earthlink, *et al.*, Br. App. 10a. For example, in Arizona, the cities of Phoenix and Tucson are dense population centers. Recent statistics place broadband deployment there by the incumbent cable provider and the phone company at record levels. However, like most other States, there are also many rural areas in Arizona with low and sometimes zero broadband penetration.[8] State Commissions, like the Arizona Corporation Commission, have a significant interest in promoting broadband deployment within their respective jurisdictions and in working with the FCC to ensure that the objectives of both the federal and State jurisdictions are achieved. This case threatens the ability of NARUC's member commissions to ensure that important objectives regarding this vital part of each State's economy can be met.

Accordingly, NARUC urges this Court to uphold the ruling below.

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like "communications services." See also *Declaratory Ruling* at ¶95 (Pet. App. 152a), asking if forbearance of Title II mandates is important "[t]o the extent cable modem service . . .[is] . . .subject to telecommunications service classification."

[8] Congressional Budget Office, *Does the Residential Broadband Market Need Fixing?*, CBO Paper, December 2003, at 7. Table 2 "Percentage of Zip Codes Nationwide with High-Speed Internet Access Subscribers, by Number of Providers" indicating that 29.3 percent of the nation's zip codes either have zero or one broadband provider. Available at: http://www.cbo.gov/showdoc.cfm?index=4868&sequence=0.

SUMMARY OF ARGUMENT

It is clear from explicit textual references in the 1996 Act, that Congress was very interested in broadband deployment issues, and, the FCC claims, in discouraging regulation. It is hard to square those concerns with the FCC's proposal to assert *sweeping and undefined* Title I authority over the "internet and other interactive computer services" through what the agency concedes is a *new approach* to defining "information service." When Congress wishes to discourage regulatory oversight, it has no difficulty specifying the modality. The FCC already has a tool specified by Congress to accomplish its goal of limited oversight – federal forbearance authority. The scheme to use Title I to create potentially unlimited federal authority to regulate these services is, on its face, inconsistent with FCC and Court precedent, Congressional intent, and plain text of the statute. This reclassification will generate uncertainty about FCC authority over such services and carries serious ramifications for State universal service, homeland security, emergency calling, and consumer protection policies.

As the FCC's 1998 explanation of DSL service illustrates, the Act lacks an exception to the imposition of Title II mandates on a telecommunications service based on integration with other services. The test for common carriage as a basis for excluding cable modem service from Title II mandates is well briefed. But *everyone agrees* that cable companies are actually providing "telecommunications." In contrast to the services involved in cases cited by petitioners, *everyone also agrees* that the *combined* product, just like its phone company analog, is clearly being offered indiscriminately and directly to all comers by the owner of the broadband transmission facilities. After conceding cable modem is a "telecommunications service" if offered on a standalone basis, it isn't a surprise that the FCC spends much of its brief attempting to support the unsupportable, i.e., the

notion that if telecommunications service and information services are "integrated" or bundled, that the "telecommunications service," along with the allied statutory mandates, simply disappears. The §153(44) definition of a "telecommunications carrier" is unambiguous on its face. The text specification that common carrier obligations only apply "*to the extent that it is providing telecommunications services*" clearly contemplates combined offerings precisely like the service at issue here. At least initially, the Department of Justice agreed. Indeed, the FCC's tortured explanation of the separate definitions found in the Communications in Law Enforcement Act (CALEA), in a related proceeding, highlight the disparity between its deficient rationale and clear statutory text. CALEA states that its provisions do NOT apply to "information services," but only to "telecommunications services." This creates a problem, because it is clear Congress expected CALEA would apply to cable modem facilities. If, as in the FCC's Title I world, cable modem can only be an "information service" with no trace of the component "telecommunications service" discernable – then CALEA cannot apply. The FCC escapes the facial inconsistency by again defining its way out of the conundrum. The FCC describes the CALEA definitions of "telecommunications services" and "information services" as "very similar" to those in §153. However, the unusual FCC approach to construction of those similar definitions maps the flawed logic of the *Declaratory Ruling* – to achieve the precise opposite result. The FCC claims, in the CALEA proceeding, that broadband Internet access service providers are wholly "telecommunications carriers," that "by *definition* cannot be providing an information service."{emphasis added} At the same time, the agency is arguing to this Court, that the "similar" definitions that apply under §153, Internet access services offered by cable companies to the public for a fee are entirely "information services" that cannot by definition contain any common carrier "telecommunications service"

element. In light of the legislative history and the statutory text, the Ninth Circuit could only conclude that the Act is susceptible only to one reasonable interpretation – that cable modem service is partly telecommunications service and partly information services. The court "did not discern any ambiguity in the statutory meaning for the agency to interpret," and thus "*Chevron* deference would have been inappropriate even if the agency had interpreted the statute prior to *City of Portland*." Pet. App. 27a (Thomas, J., concurring). This Court should uphold the ruling of the court below.

ARGUMENT

I. THE FCC'S NOVEL ASSERTION OF TITLE I AUTHORITY IS INCONSISTENT WITH THE UNAMBIGUOUS TEXT OF THE STATUTE AND FCC PRECEDENT.

As noted *supra*, if endorsed by this Court, the undefined scope of the proposed FCC classification scheme will generate significant uncertainty over both the FCC's authority to impose any Title II obligations on this recently "discovered" and defined *hybrid Title I service*, as well as State authority over the underlying facilities and any voice services offered as part of an "integrated" package of "information services."[9]

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[9] The FCC's "Memorandum Opinion and Order" *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling*, WC Docket No. 03-211 (FCC 04-267) (rel. Nov. 12, 2004) is currently before the Ninth Circuit on State challenges to FCC's claims of exclusive jurisdiction over non-facilities based internet protocol(IP)-enabled competing phone service. Order available at: http://hraunfoss. fcc.gov/edocs_public/attachmatch/FCC-04-267A1.pdf. Cable companies already use IP-enabled services to provide phone service See, e.g., Charney, Ben, *Year in Review: VoIP's voice gets stronger* (CNET Jan. 5, 2005 - Available at http://news.com.com/Year+ in+review+VoIPs+voice+gets +stronger/200997352_3499915.html?tag=cd.hed). "[C]able companies chose to declare VoIP ready for prime time in 2004 . . .Time Warner now sells telephone service in 30 of its 31 markets." See also, Drucker, Jess, *Bells offer Free WiFi Equipment to Defend Internet Turf*, (Wall Street

The revelation that selling high speed data services to the general public for a fee, in tandem with ISP service, should be properly classified as an "information service", reverses decades of policies promoting nondiscriminatory access to networks and distorts the statutory text. As Michigan Commissioner Robert B. Nelson, Chairman of NARUC's Committee on Telecommunications, recently told Congress:

> The FCC is attempting to promote broadband deployment by minimizing the regulation of DSL and other Internet platforms. However, the agency's approach, which is based on an obvious misreading of the text of the Act, is misguided as a matter of both the law and policy. While I am sympathetic to the overall policy goal of making it easier for providers to invest in innovative technologies and services, I have serious reservations regarding the FCC's creation of a whole new federal regulatory oversight system by reclassifying services – services that even the FCC, until recently, agreed were stand-alone common carrier services regulated under Title II of the Act – as "information services."[10]

Journal July 6, 2004) at A15 " Comcast . . . to make its telephone service available to 40 million . . .Time Warner Cable . . .offer telephone service in all 31 of its markets . . .Cablevision . . .package digital cable TV, high-speed Internet access and. ..free telephone calling."

[10] *The Regulatory Status of Broadband Services: Information Services, Common Carriage, or Something In Between?: Hearing Before the House Comm. on Energy and Commerce, Subcommittee on Telecommunications and the Internet*, 108th Cong. 16-17 (2003). Statement of Robert B. Nelson, Chairman, National Association of Regulatory Utility Commissioners (Available at http://energycommerce.house.gov/108/Hearings/07212003hearing1024/Nelson1603Print.htm).

The FCC companion rulemakings on cable modem services and wireline broadband suggest some Title II obligations may ultimately attach to this putative new class of "hybrid information services."[11] However, the text of the statute clearly indicates that the FCC has *no* authority under Title I to impose common carrier obligations the Act expressly imposes only on those providing "telecommunications services" under Title II.[12] Section 153(44) specifies that:

> "A telecommunications carrier shall be treated as a common carrier under this Act *only to the extent that it is providing telecommunications services* . . ." 47 U.S.C. §153(44) {emphasis added} Earthlink, *et al.*, Br. App. 2a.

If the FCC's classification is upheld, one question left outstanding is what, if any, limitations are there to the FCC's authority to impose Title II-like or other obligations on "new" special classes of Title I "information service providers" it chooses to define.

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[11] See footnotes 6 and 7 supra.

[12] Title II, 47 U.S.C. §201 *et seq.* requires telecommunications service providers to charge just, reasonable, and non-discriminatory rates (§§201-202) (Earthlink, *et. al.*, Br. App. 4a-6a), comply with FCC investigations, complaint proceedings and fines (§§204-209), provide protection for customer information (§222), provide disabled access (§225 & §255), require compliance with Communications in Law Enforcement Act (§229), to interconnect with other carriers (§251(a) (Earthlink, *et al.*, Br. App. 6a and to contribute to the federal universal service fund (§254)(Pet. App. 211a).

The FCC points out Congress explicitly charged the FCC (and States) to "encourage the deployment on a reasonable and timely basis" of broadband capabilities to "all Americans,"[13] and gave the FCC authority to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment." As reiterated in the *FCC Brief* at 30, the Internet was then . . .

> "flourish[ing]" under "a minimum of government regulation," 47 USC §230(a)(4), and [the FCC] declared that the Internet should, to the extent possible, remain "unfettered by Federal and State regulation," 47 USC §230(b)(2)"[14]

It is clear from these explicit textual references in the Act cited by the FCC, that Congress was both aware of and very interested in broadband deployment issues. If the FCC is correct, Congress was also interested in discouraging regulation for "the Internet and other interactive computer services." It is hard to square those Congressional concerns and the Act's numerous specific provisions addressing both "advanced" and "information" services, with the FCC's cable modem and *Wireline NPRM* rulemakings' implied contention *that Congress wants the FCC to assert sweeping*

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[13] See, *Telecommunications Act of 1996*, §706, Pub. L. No. 104-104, 110 Stat. 153. (47 U.S.C. §157 note) Earthlink, *et al.*, Br. App. 10a. The FCC has acknowledged this directive "does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods." *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, 13 F.C.C.R. 24,012 at ¶ 69 (1988). Rather it "directs the Commission to use the authority granted in other provisions . . . to encourage the deployment of advanced services." Id.

[14] Curiously, in both cited provisions, §706 and §230, Congress specified a State role. Earthlink *et al.* Br. App. 10a. Pet. App. 210a. Cf., *Wireline NPRM* ¶3 & ¶5, *Cable NOI*, 15 F.C.C.R. at 19,288 ¶4.

and undefined Title I authority over the "internet and other interactive computer services" through what the *Wireline NPRM* concedes is a new approach to defining "information service." When Congress wishes to discourage regulation and regulatory oversight, it has no difficulty specifying the modality.[15] Indeed, as others have pointed out – the FCC already has a tool specified by Congress to accomplish its goal of limited oversight – federal forbearance authority.

II. BUNDLING AN "INFORMATION SERVICE," WITH WHAT THE FCC CONCEDES IS A "TELECOMMUNICATIONS SERVICE" IF OFFERED SEPARATELY, CANNOT IMMUNIZE A CARRIER'S FACILITIES FROM TITLE II MANDATES.

A ruling that the bundled service to the end user dictates the classification of all of its component parts is likely to result in over or under regulation of the entire service, including any applications layer. This would in fact, be directly contrary to the claimed Congressional objective to maintain a light-handed regulatory approach for Internet and information services cited by the FCC.

Moreover, it misconstrues the Act which recognizes through its definitions the various components that make up advanced services.[16] Nowhere in the Act is there an

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[15] See, e.g., 47 U.S.C §160, (Pet. App. 209a), §161, & §274(g)(2).

[16] The FCC's revised view of "information service" specifically includes what the FCC has already found to be a common carrier "telecommunications service." Other uses of the term "information service" in the Act undercut this view of Congressional intent. The Act repeatedly uses the term "information service" in the context of a consumer purchase of information delivered to the customer through a telecommunications service. See, e.g., 47 U.S.C. §228 regarding pay-per-call services where "information services" are referenced several times in the context of their purchase using "telecommunications services." The text references clearly demonstrate that the authors thought information services and common carrier services were distinct. The statute assumes two distinct players. It is the common carrier providing a "telecommunications service" that terminates service to the information service provider.

exception to the imposition of Title II mandates on a telecommunications service just because it is bundled with other services.

SBC contends the definitions in the Act, taken together, are consistent with the traditional test for common carriage, which asks (1) whether the service permits transmission of "intelligence of [the customer's] own design and choosing," and (2) whether that transmission service is offered to all comers "indiscriminately." *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) (internal quotation marks omitted).[17] In the case of both cable modem and wireline DSL service, *everyone agrees* the facilities provider is actually providing "broadband transmission" or "telecommunications." In contrast to the services involved in *Virgin Island Telephone* cited at page 32 of the *FCC Brief*,[18] *everyone also agrees* that the *combined* product is clearly being offered indiscriminately to all comers, i.e., the public, by the owner of the broadband transmission facilities. After conceding cable modem is a "telecommunications service" if offered on a stand-alone basis,[19] it isn't a surprise that the FCC spends

[17] *SBC Brief* at 11. Cf. 47 U.S.C. §§ 153(43), (44), & (46) (1996). Earthlink, *et al.*, Br. App. 1a-2a.

[18] *Virgin Islands Telephone Corp. v. F.C.C.*, 198 F.3d 921, 924 (D.C. Cir. 1999. (In this case, the facilities owner did not offer any service to a class large enough to satisfy the FCC: "[The] Bureau concluded that AT&T-SSI will not be offering a service "directly to the public, or to such classes of users to be effectively available directly to the public" and that, consequently, AT&T-SSI is not a "telecommunications carrier" pFroviding "telecommunications service" under the 1996 Act." Contrast that with the situation posited in the *Declaratory Ruling* where, as the FCC concedes in its brief, if offered on a stand-alone basis, that broadband transmission meets both prongs of the common carrier test as well as the statutory definition.)

[19] *FCC Brief* at 24. ("To be sure, if a cable modem service provider made a "stand-alone offering of transmission for a fee directly to the public," Pet. App. 97a, such that subscribers could pay for and use the transmission without the information service capabilities . . .then such a

much of its brief attempting to support the unsupportable, i.e., the notion that if telecommunications service and information services are "integrated" or bundled, that the "telecommunications service," along with the allied statutory mandates, simply disappears.

NARUC respectfully suggest that the §153(44) definition of a "telecommunications carrier" is unambiguous on its face. Earthlink, *et al.*, Br. App. 2a. The text specification that common carrier obligations only apply "*to the extent that it is providing telecommunications services*" clearly contemplates combined offerings precisely like the service at issue here. In light of the legislative history and the statutory text, the Ninth Circuit could only conclude that the Act is susceptible only to one reasonable interpretation – that cable modem service is partly telecommunications service and partly information services. The court "did not discern any ambiguity in the statutory meaning for the agency to interpret," and thus "*Chevron* deference would have been inappropriate even if the agency had interpreted the statute prior to *City of Portland*." Pet. App. 27a (Thomas, J., concurring). Indeed, even the FCC ruled in 1998 that the 1996 Act did apply the *Computer II* framework to broadband[20] and conceded as much in the *Wireline NPRM*.[21] NARUC's members are not the only governmental entities to find the FCC's "new approach" inconsistent with the statute. As outlined in the September 30, 2004 *Opposition Brief of Respondent Earthlink, Inc.*, at 10-12, both the U.S. Department of Justice ("DOJ") and the Office of the Solicitor General ("SG") made public their disagreement with the FCC's new idea in a December 8, 2003 letter. After refusing to join the FCC's petition for rehearing *en banc* to the Ninth Circuit, the DOJ-SG letter to the FCC raised

provider might well be 'offering" telecommunications and thus providing a telecommunications service.")

[20] See, *Brand X Internet Services*, 345 F.3d at 1137. Pet. App. 32a.

[21] See, *Wireline NPRM* at ¶44.

concerns about the impact of the FCC's action on the application of the Communications Assistance for Law Enforcement Act, 47 U.S.C. §§ 1001 et seq. ("CALEA") to Internet-based communications. The letter directly contradicts the interpretation currently offered to this Court by the government:

> Law Enforcement advanced the theory that Internet access service is a "telecommunications service," or at least contains a "telecommunications service" that implicates the CALEA statute. . . [The] Declaratory Ruling, which classifies Internet access as a pure information service, suffers from statutory interpretation problems and directly threatens CALEA. EarthLink Opp. App. 14a.

Subsequently, DOJ pressed the FCC to expedite a separate proposed rulemaking to explain how, in light of its other rulings, CALEA could still apply to new Internet Protocol-based services.[22] Closer examination of the FCC reasoning in that proceeding is instructive as the issues that arise in that context also involve whether a carrier can simultaneously be a "telecommunications carrier" and an "information service provider." In Title II, 47 U.S.C. §229(b), requires the FCC to prescribe rules that require 47 U.S.C. §153(10), "common carriers" to comply with CALEA. Earthlink, *et al.*, Br. App. 1a. In this proceeding,

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22 *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295; RM-10865, Notice of Proposed Rulemaking and Declaratory Ruling, 19 FCC Rcd 15676, 15,691-15,693 (Rel Aug. 9, 2004). (*CALEA NPRM)* at ¶¶32-36. Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-187A1.doc.

the FCC *argues* that the CALEA definition of "telecommunications carrier" is broader than the 1996 Act definition found in 47 U.S.C. §153(44). For the FCC to present a regulatory "unified field" theory to law enforcement, the CALEA telecommunications carrier definition *has* to be broader. Why? Because CALEA applies to "telecommunications carriers" but the statute *specifically* exempts all "information services" from the application of its rules. The FCC attempts to explain it this way:

> "CALEA's definition of "information services" is very similar to that of the Communications Act. For purposes of the Communications Act, the Commission has concluded that cable modem service is an information service and has tentatively concluded that wireline broadband Internet access service is also an information service. Assuming those determinations become final, those services would, nonetheless, have to be evaluated under CALEA's separate definition of "telecommunications carrier" which, as discussed above, is broader than the definition in the Communications Act. ***Where a service provider is found to fall within CALEA's Substantial Replacement Provision it would be deemed a "telecommunications carrier" for purposes of CALEA to which CALEA obligations would apply. If, at the same time,***

> *we interpreted CALEA's Information Services Exclusion to apply, it would present an irreconcilable tension; that is, particular service providers would find themselves at the same time subject to CALEA under the Substantial Replacement Provision and exempted from it by virtue of the Information Services Exclusion.* We believe that the better reading of the statute is to recognize and give full effect to CALEA's broader definition of "telecommunications carrier" and *to interpret the statute to mean that where a service provider is determined to fall within the Substantial Replacement Provision, by definition it cannot be providing an information service for purposes of CALEA. CALEA NPRM*, 19 F.C.C.R. at 15,705-15,706, ¶50 (footnotes omitted) {emphasis added}.

The Substantial Replacement Provision cited, supra, is 47 U.S.C. §1001(8)(B)(ii)—from which "information services" are expressly excluded. In the CALEA proceeding, the FCC is proposing the precise opposite of the reasoning presented in the *Declaratory Ruling*. Earthlink, *et al.*, Br. App. 9a - 10a. The FCC claims, in the CALEA proceeding, that broadband Internet access service providers are wholly "telecommunications carriers," that "by *definition* cannot be providing an information service." *CALEA NPRM* at ¶50. Simultaneously, the agency is arguing that under the Communications Act, Internet access services offered by

cable companies to the public for a fee are entirely "information services" that cannot by definition contain any common carrier "telecommunications service" element. The literal language of 47 U.S.C. §1001(8)(C)(i) demonstrates why the CALEA construction that a telecommunications carrier "by definition" may not also provide information services crumbles under even cursory examination. It states that a "telecommunications carrier" (under either 47 U.S.C. §1001(8)(A) or (8)(B)) "does not include – (i) persons or entities *insofar as they are engaged in providing information services*." 47 U.S.C. §1001(8) (C)(i).{emphasis added} Earthlink, *et al.*, Br. App. 10a. The "insofar as" language in this section, *precisely like the "only to the extent" language in §153(44) referenced earlier in the discussion of the Communications Act's/*§153 *"telecommunications services"*, clearly reflects Congress' intent that a single entity can simultaneously provide services that bring it within the definition of "telecommunications carrier" and also provide "information services." It also clearly demonstrates, in both contexts, that if an entity meets both definitions, that entity is excluded *to the extent that it provides information services*. The text of the CALEA exemption neither compels *nor allows* the FCC's reading that a given entity must be either wholly covered by or wholly exempted from the CALEA requirements.

This tentative conclusion in the *CALEA NPRM* that once an entity meets the definition of "telecommunications carrier" it cannot possibly also offer an information service maps precisely the flawed reasoning the FCC advances in the *Cable Declaratory Order*. There, the Commission held that an entity offering an information service could not by definition also be providing the underlying telecommunications on a common carrier basis. In both dockets, the FCC fails to grasp that, by definition, *every* information service includes both an underlying transmission component and also some additional functionality. Under

neither statute does one component of the bundled service eliminate the other nor does the service thereby escape Title II obligations.

CONCLUSION

As discussed, supra, Congress has provided the FCC with the tools needed to reach the light oversight it wishes to assure applies to high-speed broadband services – federal forbearance authority. The novel definitional scheme to use Title I to create an undefined and potentially unlimited paradigm shift in federal authority to regulate hybrid services is, on its face, inconsistent with FCC precedent and the statutory text. If adopted as a basis for reversing the decision below, the undefined scope of the proposed classification scheme will generate significant uncertainty over both the FCC's authority to impose any Title II obligations on this "newly discovered" hybrid *Title I service*, as well as State authority to promote critical State programs. Based on the forgoing, NARUC respectfully requests this Court affirm the decision below.

Respectfully Submitted

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